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NO. 87-188

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

RANDOM HOUSE, INC. and IAN HAMILTON,

Petitioners,

v.

JEROME D. SALINGER, a/k/a J.D. SALINGER,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

BRIEF OF AMICI CURIAE KENNETH S. DAVIS, JOHN HERSEY, A.E. HOTCHNER, JUSTIN KAPLAN, J. ANTHONY LUKAS, and RALPH G. MARTIN, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF
AS AMICI CURIAE

Kenneth S. Davis, John Hersey, A.E. Hotchner, Justin Kaplan, J. Anthony Lukas and Ralph G. Martin respectfully move for leave to file the annexed brief amici curiae supporting the petition for a writ of certiorari. They are authors of works of biography, history, and social and

political reportage.

These authors are concerned that the Court of Appeals' denial of fair use with respect to "unpublished" letters, and its inhibitive definition of "expression", will unduly hamper reasonable use of such copyrighted works for normal biographical, historical and scholarly purposes. Since these issues are profoundly important to these amici and many other authors they seek leave to file the attached brief which advances additional reasons for granting the petition. Petitioners have consented to the filing; Respondent has ~~not replied to~~ refused our request for consent.

Respectfully submitted,

IRWIN KARP
Attorney for amici curiae
Davis, Hersey, Hotchner,
Kaplan, Lukas and Martin

August 28, 1987

QUESTIONS PRESENTED

1. Are legally disseminated and accessible letters insulated from fair use by biographers and historians because those writings are, in Copyright Act parlance, "unpublished"?

2. Did the Court of Appeals employ an unduly restrictive definition of copyright-protected "expression" that denies biographers, historians, and similar authors the right to use ideas, facts and other information that actually are not protected by the Copyright Act? copyright?

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INTRODUCTION

Amici curiae are authors who have written works of biography, history and political and social reportage, some of which are listed in Appendix A.

Because "unpublished" letters, journals and the like are indispensable resource materials for biographies, histories and similar books, these amici are very concerned that the Court of Appeals' denial of fair use with respect to unpublished letters will sharply restrict reasoonable use of these materials for biographical, historical and scholarly purposes.

Amici adopt and incorporate here those portions of the Random House-Hamilton petition setting forth the opinions below, the jurisdictional grounds, the constitutional and statutory provisions involved, and also the petitioners' Statement of the Case.

REASONS FOR GRANTING THE WRIT

The Court of Appeals conclusion that "fair use" normally does not apply to "unpublished" letters (although lawfully

disseminated and made accessible to authors) is based on a talismanic view of the copyright term "publication" which is totally inconsistant with the House Judiciary Committee's opinion that "publication" is an artifical, obscure and defective concept. H. Rept.94-1476, at 129*. Given this fundamental inconsistency, the sound reasons for allowing fair use of such materials, and the devestating consequences of not doing so, amici curaie believe the Court should grant the petition for certiorari, and review this question, which has far-reaching consequences for American biographers, historians, scholars and other authors.

Amici curiae also urge that the Court review the Court of Appeals' highly restrictive definition of

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* 94th Cong., 2d Sess. (1976); U.S. Code Cong. & Admin. News (1976) 5666

copyright-protected "expression" which, they submit, will severely impede the right of biographers and historians to report facts, ideas and information although these materials are not protected by copyright.

The amici curaie agree with petitioners that the Court should review a third question: Whether the prior restraint on Ian Hamilton's work of original authorship-- not a pirated version of a prior work -- violates the First Amendment by denying his right to publish facts and other information, and his views and opinions concerning J.D. Salinger and Salinger's writings.

I.

THE COURT OF APPEALS ERRED IN RULING THAT FAIR USE NORMALLY DOES NOT APPLY TO UNPUBLISHED LETTERS

1. The Court of Appeals and District Court agreed that facts, ideas and information in J.D. Salinger's letters are not protected by copyright and could be used by Ian Hamilton in his biography. (As this indicates, copyrights are not weapons reclusive authors can use to prevent unauthorized biographies or unwanted publication of ideas and information they have disclosed to others.)*

But the Court of Appeals' held that fair use normally does not apply to unpublished letters, albeit lawfully disseminated and accessible. This ruling

*Suits for invasion of privacy, not copyright infringement actions, test whether unauthorized biographies invade rights of privacy and whether First Amendment protection under Time,Inc. v. Hill, 385 U.S. 374 (1967) and its progeny bars such a claim in a given case.

will hamper biographers and historians by preventing their use of limited quotations and paraphrasings from that material to give readers essential insights and understanding, to illustrate their analyses, and for other purposes that "fair use" permits for "published" letters.

2. The Court of Appeals agreed that Hamilton's biography plainly satisfied the first fair-use criterion: i.e., it "fits comfortably within" several of the fair-use categories -- i.e., "criticism", "scholarship" and "research" -- so that he had a legitimate fair-use purpose in quoting Salinger or otherwise drawing on his protected "expression." (App. A-10).

The fourth and most important fair use criterion is the effect of Hamilton's borrowing on Salinger's potential market for his letters. While the Court of Appeals said "this fair use factor weighs

slightly in Salinger's favor" (App. A-18), its analysis, we submit, indicates the contrary. The Court agreed that Hamilton's book could not displace the market for a future edition of Salinger letters, and conceded that "most potential purchasers of a collection of the letters would not be dissuaded by publication of the biography." (App. A-17)

Actually, no adverse market effect could occur. Only a small part of 44 letters, by either Court's count, were quoted or paraphrased. And even the 44 letters, in their entirety, would be a small part of a printed volume containing "collected letters"; indeed, such books often include 400, 500 or more pages.*

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*e.g.: LETTERS OF F. SCOTT FITZGERALD, Charles Scribners & Sons, 1963; 615 pp. HENRY JAMES, LETTERS: VOL.3 (1983-1895), Belknap Press, 1980; 579 pp. SELECTED LETTERS OF ROBERT FROST, Holt, 1964, 466 pp.

The passages in dispute, a mere drop in such a large bucket, would not diminish the audience of readers who might buy a volume of Salinger's letters, or dissuade libraries who are principal purchasers of published volumes of "collected letters." And, the passages in dispute did not, therefore, endanger Salinger's right of "first publication" of his letters.

3. While these two important fair use factors would not, we submit, bar Hamilton's limited quotes and paraphrases, the Court of Appeals decided that Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985), required the conclusion that "unpublished" works -- here, the Salinger letters -- "normally enjoy complete protection against copying any protected expression" (App. A-13), thus precluding any fair-use quotation or paraphrasing of "protected expression."

This exclusionary rule would prevent biographers or historians from quoting or paraphrasing copyright-protected expression from unpublished letters of living or deceased public officials, scientists, artists, business executives, authors, generals, or other subjects of public interest, even though the letters lawfully had been dissimeinated and made accessible to biographers, historians and scholars.

By contrast, had the letters been "published", in the technical copyright sense ("the distribution of copies ... to the public" [Sec. 101]), biographers and historians concededly could quote from and paraphrase "protected expression " within the limits allowed by fair use.

4. We submit the Court of Appeals erred, and that J.D. Salinger's unpublished letters were subject to the

limited quoting and paraphrasing of copyright-protected material which biographers, historians and scholars are permitted under the fair-use doctrine.

Since, the Salinger letters automatically became copyrighted works on January 1, 1978 under section 303 of the new Copyright Act (Title 17), they were subject to its fair use provisions (Sec. 107.) In light of the House Judiciary Committee's Report on the 1976 Copyright Act, there is no basis for "normally" excluding "unpublished" copyrighted works from the reach of fair use. The House Report said that "publication" possibly was the most important concept under the 1909 Copyright act and "also represents its most serious defect" (emphasis added.) H.Rept. 90-1476, at p. 130. It said that in earlier times when works usually

were disseminated by distributing printed copies, "publication" could serve as a dividing line between common law and statutory protection, but that as means of dissemination multiplied, "the concept of publication has become increasingly artificial and obscure." id. at 130.

It is most artificial to permit or prohibit fair-use quotation or paraphrasing of letters depending on whether they are "published" or "unpublished." A collection of letters, issued in a small printing, may be disseminated to only a few people and then become inaccessible by going out-of-print.* The letters, nonetheless are "published" and therefore are subject to fair use for the duration of their copyrights.

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*Indeed, a work can be "published" by distribution of one or a few copies (H. Rept. at 138), and that "pubilcation" would expose it to fair use.

While "publication" may not truly make a work public, "unpublished" letters of a president (or author) in a library may be disclosed and disseminated lawfully to hundreds of persons who can read them, and the letters remain accessible for decades to biographers, historians, scholars and journalists.

The rational and meaningful distinction, for fair use purposes, is between "undisseminated"and "disseminated" works. Harper & Row had not disseminate its Ford Memoirs at the time the Nation copied from them; rather, Harper & Row took precautions to prevent disclosure, and the Nation used a "purloined" manuscript.

On the other hand, Mr. Salinger's letters were voluntarily dissemniated by him to their recipients ... who lawfully

deposited them in three University libraries ... which lawfully made them available to biographer Hamilton and others who used those collections. As Professor Nimmer makes clear, recipients of letters are entitled, no less than bookstores, to disclose their contents to others, and to deposit the letters in libraries which can lawfully disclose their contents to individuals by allowing them to read the letters. NIMMER ON COPYRIGHT (1985), Sec. 5.04, at 5-32,33.

This process of disseminating letters, which makes them lawfully accessible to biographers and historians, was well established long before Mr. Salinger launched his correspondence with Judge Learned Hand, Whit Burnett and others. The editor of George Bernard Shaw's 1874- 1897 letters noted, for example,

> "... though Shaw must have been aware even before the turn of the century that his letters were being saved and would one day receive public scrutiny, there is never in them an element of self-consciousness, an awareness that the world is reading over his shoulder."

BERNARD SHAW: Collected Letters, Vol. I, 1874-1897, at. xi; Dodd, Mead; 1965.

A more contemporaneous example of the common practice:

> "Most of Dylan Thomas's letters by now have found their way into American University libraries, in particular those of Harvard*, New York State (Buffalo) and Texas*. All those libraries or rather their librarians, have been most helpful in allowing me to see his letters, some of which I quote." Constantine Fitzgibbon, THE LIFE OF DYLAN THOMAS, at vii; Little, & Co., 1965

Amici respectfully submit that the Court should grant certiorari and consider whether fair use applies to lawfully disseminated unpublished letters.

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*Whose collections also house various of the Salinger letters.

II

THE COURT OF APPEALS' DEFINITION OF "EXPRESSION" UNDULY INHIBITS USE OF LETTERS BY BIOGRAPHERS AND HISTORIANS

1. As the District Court stated, letters "play an important role" in the writing of biography. App. A-36. Leon Edel, eminent biographer of Henry James, noted that the "pioneer" biography of Thackeray would have been impossible without his letters, and that while James "burned his papers in a great bonfire in his garden", James' biography could nonetheless be written because he could not feed the fire with "thousands of letters which had reached others' hands..." Leon Edel, WRITING LIVES; W.W. Norton, 1984, at 22.

Biographers, historians and scholars must be able draw on these materials for facts and information, and quote from them to provide insights, understanding,

and the basis for criticism and analysis. Wallace Stevens' biographer said that "at every turn" the poet's letters "provide(s) insights into and confirmation of the background of his poetry and thought." Samuel French Morse. WALLACE STEVEN: POETRY AS THOUGHT; Pegasus, 1970, at xiii.

2. Amici curiae believe that the Court of Appeals has imposed a severe restraint on biographers' and historians' use of these indispensible source materials through its unduly inhibitive standard for determining whether given passages of a book permissably report facts and information, or impermissably use the letter writer's protected "expression" and therefore "infringe". (Having excluded Salinger's letters from "fair use" because they were unpublished, the Court nonetheless analyzed the "sub-

stantiality" of their use by Hamilton under the third fair use criterion.)

The District Court had found 200-300 words of direct quotation; between 0.8% and 2.0% of the letters. App. A-23. While it thought the biography drew substantially on the letters, the District Court found that "the vast majority of the material taken by Hamilton is not copyright protected" since it consisted of information about Salinger, his ideas and thoughts - "vital historical fact..." App. A-25.

The District Court held that infringement occurs where the second author oversteps "permissable limits by taking the author's craftsmanship", or "image", or "literary device", or "metaphor", or "choice of words." App. A-27, A-29. The District Court counted as infringements the passages in which

Hamilton took such protected material by direct quote or paraphrase. But it found these were limited to 30 instances in which a word, phrase or image was taken; and they were not the "heart of Salinger's letters, nor of Hamilton's book." App. A-35, A-36.

The Distict Court's opinion gave many examples of passages in the book which it held to be permissable use of facts, ideas and other unprotected information; and several examples of passages it considered to appropriate Mr. Salinger's protected expression by direct quotation or paraphrase.

3. The Court of Appeals sharply disagreed. It held that Hamilton had appropriated Salinger's expression in many more passages. It said that protected "expression" includes "'the author's analysis or interpretation of events, the way

he structures materials and marshals facts, his choice of words and the emphasis he gives to particular developments.'" App. A-15, quoting from Wainright Securities, Inc. v. Wall Street Transcript Corp., 558 F.2d 91, 95-96 (2d Cir. 1977).

Unlike the District Court's opinion, the Court of Appeals' opinion provides little practical guidance. Its analysis of the disputed passages is not illustrated by concrete examples. Attorneys who counsel biographers, historians and their publishers will find in it only generalities -- broad statements which lead to puzzlingly different results in different Circuits, and panels.

Biographers and historians need clearer guidance. And while quantitive tests are not available, the chilling effect on legitimate use of biographical and historical

resources, under the vague expression-fact/information test can be reduced by opinions that amply illustrate the court's application of principles with enough examples from the two works -- as the District Court's opinion provided and the Court of Appeals' opinion did not.

The Court of Appeals' observations on the nature of protected expression clash sharply with its prior opinions in such cases as Hoehling v. Universal City Studios, Inc., 618 F. 2d 972 (2d Cir. 1980) where it bluntly rejected the idea that copyright protected such elements as the structuring or selection of facts.

Indeed, in Hoehling, the Court gave very short shrift to copyright protection for biographers and historians, saying that the "scope of copyright in historical accounts is narrow indeed" and that "broad latitude .... and a relatively

free hand" must be granted to subsequent authors to make use of their works. (618 F.2d at 978, 980). Amici do not agree with those conclusions; structure and selection of facts are very much a part of biographers' and historians' creative craftsmanship, essentials of their copyrightable expression.

The Second Circuit seems more willing to recognize that in works involving considerably less craftsmanship -- e.g., Wainwright Securities ,Inc. The effect of Salinger is to warn biographers and historians they run great risk in using facts, ideas and other information found in letters -- although they do not appropriate the prior author's language -- because a court may later declare they appropriated the "association" or "combination" or "sequence" or "arrangement" of unprotected ideas and thoughts contained

in the letters.

The Court of Appeals thus swings the pendulum from one extreme (very narrow protection for highly structured works such as biography and history) to the opposite extreme (very broad protection for less structured and fragmentary materials such as letters.) The Court of Appeals overemphasized "structure" and similar elements to create a much higher degree of protection for short, unrelated works such as the individual letters in a library collection, each of which contains a few facts, ideas, and images phrases. Yet, in reporting some of these, with minimal literal quotation, a biographer or historian does not appropriate the "structure" of the collection or the individual letter.

A second biographer impermissably appropriates a prior biographer's "express-

ion" when, in Judge Story's words "the labors of the original author are substantially appropriated to an injurious extent", Folsom v. Marsh 9 F. Cas. 342, 348 (No.4,901) (CC Mass.)

A second biographer can, by substantially appropriating a predecessor's structure and other elements make him an unwilling co-author of the second work -- providing much of the effort and craftsmanship required to produce a biography, "labors" the second author avoided by the appropriation. The type of use Hamilton and countless other biographers have made of their subjects' letters does not have that effect. Hamilton did the creative work that constitutes the craftsmanship and expression of a competent, professional biographer. He did not commandeer Salinger as an unwilling co-biographer.

4. This Court has noted that the law is unsettled as to the ways in which uncopyrightable elements combine with an author's original contributions to form protected expression. Harper &Row v. Nation Enterprises, 471 U.S. at 548.

The uncertainty of the law in this area is vividly exemplified by the conflicting opinions of the District Court and Court of Appeals. Amici curiae and countless other biographers and historians are handicapped and threatened by that uncertainty, and therefore amici urge the Court to grant certiorari and review this question.

CONCLUSION

Amici curiae respectfully urge that the petition for certiorari be granted.

Dated: Port Chester, N.Y.
August 29, 1987

Respectfully submitted,

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APPENDIX A

For identification, two of each amici's several works are listed. (We have not listed the Pulitzer, National Book Award and other prizes some of them have won.)

Kenneth S. Davis:

... FDR: THE BECKONING OF DESTINY Random House, 1985.

... FDR: THE NEW DEAL YEARS; Random House, 1986.

John Hersey:

... ASPECTS OF THE PRESIDENCY; Ticknor and Fields, 1980.

... HIROSHIMA; A.A. Knopf, 1946

A.E. HOTCHNER:

... PAPA HEMINGWAY; Random House, 1966.

... CHOICE PEOPLE; Morrow, 1984.

Justin Kaplan:

... MR. CLEMENS AND MARK TWAIN; Simon & Schuster, 1966.

... WALT WHITMAN; Simon & Schuster, 1980.

J. Anthony Lukas:

... COMMON GROUND; A.A. Knopf, 1985

... DON'T SHOOT - WE ARE YOUR CHILDREN; Random House, 1971

RALPH G. MARTIN:

... JENNIE (2 vols.): THE LIFE OF LADY DIANA CHURCHILL, Prentice Hall, 1969.

... A HERO FOR OUR TIME: AN INTIMATE PORTRAIT OF THE KENNEDY YEARS; Macmillan, 1983.